Dalip Bhagwan Singh v Public Prosecutor

FEDERAL COURT (KUALA LUMPUR) — SUPREME COURT CRIMINAL REFERENCE NO 06–3 OF 1991
EUSOFF CHIN CHIEF JUSTICE, PEH SWEE CHIN AND WAN ADNAN FCJJ
4 NOVEMBER 1997

Criminal Procedure *— Judicial precedent — Stare decisis — Conflicting decisions of the Federal Court — Whether lower court may refuse to apply latest decision of Federal Court on a point of law and adopt an earlier decision*

Criminal Procedure *— Trial — Close of prosecution's case — Duty of court — Position of law in 1990 — Test of prima facie case at the end of prosecution's case — Whether court entitled to assess and weigh reliability, credibility and veracity of prosecution witnesses — Whether the Criminal Procedure Code (Amendment) Act 1997 has retrospecitve effect*

Criminal Procedure *— Appeal — Appellate court, power and duty of — Trial judge found corroboration required on an essential ingredient of the charge — Whether appellate court can reverse order of acquittal without dealing with reason given by trial judge on the need of such corroboration*

Criminal Procedure *— Trial — Close of prosecution's case — Standard of proof — Act constituting criminal offence committed before 31 January 1997 — Whether burden of proof beyond a reasonable doubt applicable — Whether test of prima facie case in the amended Criminal Procedure Code applicable — Whether amendment retrospective — Criminal Procedure Code (FMS Cap 6) ss 173(f) & 180*

Evidence *— Witness — Credibility — Witness unreliable — Whether evidence should be treated with some caution — Evidence Act 1950 s 146*

Criminal Procedure *— Appeal — Acquittal, against — Whether appellate court should interfere with order of acquittal*

The applicant was charged in the sessions court with an offence of cheating which was alleged to have taken place on 7 May 1983. The sessions court acquitted and discharged the applicant at the close of the prosecution's case without his defence being called, employing the test of prima facie case as adopted in *Munusamy v PP* [1987] 1 MLJ 492. The sessions court held, inter alia, that it could not rely on the evidence of the complainant, his mother and brother, describing them as being 'in no better position than that of an accomplice whose testimony as a matter of prudence requires corroboration'. On appeal, the High Court — which heard the appeal in 1990 — set aside the order of acquittal and ordered that the applicant be called for his defence. The applicant applied for leave to refer to the Supreme Court certain questions of law. The Supreme Court allowed the application in respect of the following questions: (i) in an appeal against acquittal at the close of the case of the prosecution, can an appellate judge refuse to apply with or without assigning any reason, the latest decision of the Supreme Court on a point of law and adopt

an earlier decision of the Federal Court?; (ii) whether the appellate court in hearing an appeal against an acquittal at the close of the prosecution's case was right in law in holding that the sessions court was wrong in assessing and weighing the reliability, credibility and veracity of the prosecution witnesses; and (iii) in an appeal against acquittal, where the trial judge found corroboration was required on an essential ingredient of the charge, can an appellate judge reverse the order of acquittal without dealing with the reason given by the trial judge on the need of such corroboration?

Held, setting aside the order of the High Court and restoring the order of the sessions court:

(1) The Federal Court and its forerunner, ie the Supreme Court has never refused to depart from its own decision when it appeared right to do so. In view of this, by necessary implication, the effect or weight of a decision of a 'full court' and that of an ordinary coram is the same. Therefore, if the Federal Court departs from its previous decision when it is right to do so, then also by necessary implication, its decision represents the present state of law. When two decisions of the Federal Court conflict on a point of law, the later decision prevails over the earlier decision. Therefore, the answer to question (i) is in the negative (see pp 14C–I and 15A).

(2) With regard to question (ii) which was cast in the past tense to indicate 1990, it should be borne in mind that the position of law referred to was as in 1990. Thus, at the time of the hearing of the appeal by the High Court, the test of prima facie case was still the law vide *Munusamy*'s case. The meaning of the test of prima facie case at the end of the prosecution's case is, 'on the assumption that the prosecution evidence was accurate, could the accused be lawfully convicted?' The word 'accurate' could mean or should mean 'true' and the words 'prosecution evidence' could be said to refer to the evidence of 'primary facts' which could logically refer to evidence or evidence sufficient enough to prove each ingredient of an offence. Once there is sufficiency of such evidence, so long as it is not inherently incredible, a prima facie case is made out. Therefore, the test of a prima facie case would not entitle one to assess the veracity or credibility of evidence of witnesses as the sessions court had done. Thus, the answer to question (ii) is in the affirmative (see pp 15B–C, 11G–I and 12A–D).

(3) With regard to question (iii), since the question was drafted in the present tense, the answer to it is a qualified 'yes', ie in an appeal when the trial judge found corroboration was required on an essential ingredient of the charge, the appellate court can reverse the order of acquittal without dealing with the reason given by the trial judge on the need of such corroboration if there is undoubtedly sufficient evidence by itself or overwhelming

A evidence from elsewhere in the case to prove beyond a reasonable doubt a case against the accused, thereby causing no miscarriage of justice to the accused, notwithstanding the failure to deal with the reasons given by the trial judge.

On the facts of this case, by virtue of s 146(c) of the Evidence B Act 1950, notwithstanding the fact that the complainant and for that matter, the other relatives involved, were not in fact accomplices, their evidence would have however to be treated with some caution; in other words, the evidence might not be given full credit normally but only some degree of it, ie less weight might be given because they were persons of bad character C for going along with the idea of the bribing.

Viewed in the light of s 146, having regard to the burden of proof beyond a reasonable doubt at the close of the prosecution's case, such burden being applicable to this case, taking account of the sessions court having the opportunity of seeing and hearing D the witnesses, it is unsafe to interfere with the order of acquittal of the sessions court which must be treated as having resulted from a benefit of doubt being given to the accused on account of unreliability of the evidence of the complainant and his relatives. Therefore, the order of acquittal of the sessions court made at the close of the prosecution's case was confirmed and the order E of the High Court set aside (see pp 17E–F, 18E, H–I and 19A).

Obiter:

(1) If question (ii) had not been framed in the past tense so as to require an answer applicable in 1990 about the burden of proof F at the close of the prosecution's case, but if it was cast in the present tense instead, then it is piquant that the sessions court would have been right in so assessing the reliability, etc of prosecution witnesses at the close of the prosecution's case, because, at the time of the hearing of this reference, the burden of proof beyond a G reasonable doubt at the close of the prosecution's case as enjoined by the ratio of *Arulpragasan*'s case (*Arulpragasan a/l Sandaraju v PP* [1997] 1 MLJ 1) would be applicable.

Moreover, although the Criminal Procedure Code (FMS Cap 6) ('the CPC') has been amended to include the test of prima facie case, the amendment would apply only to an act H or omission constituting a criminal offence committed on or after 31 January 1997, and not to any such act or omission before 31 January 1997. For such act or omission committed before 31 January 1997, the test as laid down in *Arulpragasan*, ie that of proof beyond a reasonable doubt at the close of the I prosecution's case, would still apply because the amendment is not couched in terms, either expressly or by necessary implication, which would make it retrospective in operation (see pp 15C–D and 16B–E).

(2) Assuming that the amendment to the CPC had been, expressly or by necessary implication, made to apply retrospectively, it would have run foul of art 7(1) of the Federal Constitution because if an act or omission before 31 January 1997 cannot evidentially be proved at any time to have been committed beyond a reasonable doubt at the close of the prosecution's case, the perpetrator of the act or omission would not be called for his defence and therefore would not be punishable any more. But if the act or omission in question not punishable in the way stated above can be proved by way of a prima facie case at the close of the prosecution's case (a much lesser burden of proof), then the said perpetrator will have his defence called. He will then be in jeopardy of failing possibly to throw or cast a reasonable doubt on the prosecution's case, and such failure will be punished in a manner as provided by law. Article 7(1) of Federal Constitution would thereby have been infringed, though very clearly in spirit if not by letter (see p 16E–I).

[Bahasa Malaysia summary

Pemohon telah dipertuduhkan di mahkamah sesyen dengan kesalahan menipu yang dikatakan telah berlaku pada 7 Mei 1983. Mahkamah sesyen membebaskan dan melepaskan pemohon di penutup kes pihak pendakwa tanpa memanggil pembelaannya, dengan memakai ujian prima facie seperti yang diterima-pakai dalam *Munusamy v PP* [1987] 1 MLJ 492 ('kes *Munusamy*'). Mahkamah sesyen memutuskan, antara lain, bahawa ia tidak boleh bergantung kepada keterangan pengadu, ibu dan abangnya, menyifatkan mereka sebagai 'tidak berada dalam kedudukan yang lebih baik daripada pesubahat yang keterangannya sebagai langkah berhati-hati menghendaki sokongan'. Atas rayuan, Mahkamah Tinggi — yang mendengar rayuan pada tahun 1990 — mengetepikan perintah pembebasan dan memerintahkan bahawa pemohon dipanggil untuk pembelaannya. Pemohon membuat permohonan untuk kebenaran merujuk soal undang-undang tertentu kepada Mahkamah Agung. Mahkamah Agung membenarkan permohonan berkenaan dengan soal-soal berikut: (i) dalam suatu rayuan terhadap pembebasan di penutup kes pihak pendakwa, bolehkah seorang hakim rayuan dengan, atau tanpa memberikan sebarang alasan, enggan memakai keputusan terkini Mahkamah Agung mengenai hujah undang-undang dan menerima-pakai keputusan terdahulu Mahkamah Persekutuan?; (ii) sama ada mahkamah rayuan dalam mendengar rayuan terhadap pembebasan di penutup kes pihak pendakwa adalah betul di sisi undang-undang dalam memutuskan bahawa mahkamah sesyen adalah salah dalam menilai dan menimbang kebolehpercayaan dan ketepatan saksi-saksi pihak pendakwa; dan (iii) dalam suatu rayuan terhadap pembebasan, di mana hakim perbicaraan mendapati sokongan diperlukan atas suatu unsur asas pertuduhan, bolehkah seorang hakim rayuan mengakas perintah

A pembebasan tanpa membincangkan alasan yang diberikan oleh hakim perbicaraan tentang keperluan untuk sokongan demikian?

Diputuskan, mengetepikan perintah Mahkamah Tinggi dan mengembalikan perintah mahkamah sesyen:

B (1) Mahkamah Persekutuan dan perintisnya, iaitu Mahkamah Agung, tidak pernah menolak untuk menyimpang daripada keputusan sendiri apabila ia kelihatan betul untuk berbuat demikian. Memandangkan ini, menerusi implikasi perlu, kesan atau kepentingan keputusan sebuah 'mahkamah penuh' dan koram biasa adalah sama. Maka, andainya Mahkamah Persekutuan C menyimpang daripada keputusan yang lebih awal apabila betul untuk berbuat demikian, adalah juga menerusi implikasi perlu, keputusannya mewakili keadaan undang-undang kini. Apabila dua keputusan Mahkamah Persekutuan bercanggah atas hujah undang-undang, keputusan kedua mengatasi keputusan yang D lebih awal. Maka, jawapan kepada soalan (i) adalah negatif (lihat ms 14C–I dan 15A).

(2) Berhubung dengan soalan (ii) yang dibuat dalam kala lampau bagi menandakan tahun 1990, ia harus diingati kedudukan undang-undang yang dirujuk adalah sebagaimana yang wujud pada tahun 1990. Justeru itu, pada masa pembicaraan rayuan di E Mahkamah Tinggi, ujian prima facie masih merupakan undang-undang disebabkan kes *Munusamy*. Maksud ujian kes prima facie di penutup kes pihak pendakwa adalah, 'atas anggapan bahawa keterangan pendakwa adalah tepat, bolehkah tertuduh disabitkan secara sah?' Perkataan 'tepat' boleh bermakna atau F patut bermakna 'benar' dan perkataan-perkataan 'keterangan pihak pendakwa' boleh dikatakan merujuk kepada keterangan 'fakta primer' yang boleh merujuk secara logik kepada keterangan atau keterangan yang mencukupi bagi membuktikan setiap unsur kesalahan. Sebaik sahaja terdapat keterangan begitu yang mencukupi, selagi ia bukanlah begitu sukar dipercayai, suatu kes G prima facie dibuktikan. Maka, ujian kes prima facie tidak akan memberikan hak kepada seseorang untuk menilai ketepatan atau kebolehpercayaan keterangan saksi-saksi sebagaimana yang dilakukan oleh mahkamah sesyen. Justeru itu, jawapan kepada soalan (ii) adalah 'ya' (lihat ms 15B–C, 11G–I dan 12A–D).

H (3) Berhubung dengan soalan (iii), oleh kerana soalan dibuat dalam kala kini, jawapannya kepadanya adalah 'ya' dengan bersyarat, iaitu dalam suatu rayuan apabila hakim perbicaraan mendapati sokongan diperlukan atas suatu unsur asas pertuduhan, mahkamah rayuan boleh mengakas perintah pembebasan tanpa membincangkan alasan yang diberikan oleh hakim perbicaraan I atas keperluan sokongan demikian sekiranya tanpa ragu-ragu terdapat keterangan yang mencukupi dengan sendirinya atau keterangan kukuh dari punca lain dalam kes untuk membuktikan melampaui keraguan munasabah terhadap tertuduh, justeru itu

tidak menyebabkan sebarang salah laksana keadilan kepada tertuduh, tanpa mengira kegagalan untuk membincangkan alasan yang diberikan oleh hakim perbicaraan.

Atas fakta-fakta kes ini, disebabkan s 146(c) Akta Keterangan 1950, tanpa mengira fakta bahawa pengadu dan pun begitu juga, saudara mara yang terlibat, sebenarnya bukan pesubahat keterangan mereka haruslah dilayan secara berjaga-jaga; dalam ertikata lain, keterangan biasanya mungkin tidak akan diberikan kredit penuh tetapi cuma darjah tertentu, ia berat yang lebih kurang mungkin diberikan kerana mereka adalah orang yang tidak bersikap baik dengan bersetuju dengan idea sogokan.

Dipandang dari segi s 146, memandangkan beban membukti melampaui keraguan munasabah di penutup kes pihak pendakwa, beban sedemikian terpakai kepada kes ini, dengan mengambil kira mahkamah sesyen berpeluang memerhati dan mendengar saksi-saksi, adalah tidak selamat untuk mengganggu perintah pembebasan mahkamah sesyen yang mesti dianggap sebagai telah berbangkit daripada manfaat keraguan diberikan kepada si tertuduh disebabkan ketidakbolehpercayaan keterangan pengadu dan saudara mara. Oleh itu, perintah pembebasan mahkamah sesyen yang dibuat di penutup kes pihak pendakwa disahkan dan perintah Mahkamah Tinggi diketepikan (lihat ms 17E–F, 18E, H–I dan 19A).

Obiter:

(1) Sekiranya soalan (ii) tidak dibuat dalam kala lampau hinggakan menghendaki jawapan yang boleh dipakai dalam tahun 1990 tentang beban membukti di penutup kes pihak pendakwa, tetapi jika sebaliknya ia dibuat dalam kala kini, maka adalah menarik bahawa mahkamah sesyen adalah betul dalam menilai kebolehpercayaan dan lain-lain saksi-saksi pihak pendakwa di penutup kes pihak pendakwa dalam cara demikian, kerana pada masa mendengar rujukan ini, beban membukti melampaui keraguan munasabah di penutup kes pihak pendakwa seperti yang disuruh oleh kes *Arulpragasan* (*Arulpragasan a/l Sandaraju v PP* [1997] 1 MLJ 1) adalah terpakai.

Tambahan pula, walaupun Kanun Acara Jenayah (NMB Bab 6) ('KAJ') telah pun dipinda untuk termasuk ujian kes prima facie, pindaan hanya terpakai kepada tindakan atau peninggalan yang membentuk suatu kesalahan jenayah yang dilakukan pada atau selepas 31 Januari 1997, dan bukan kepada tindakan atau peninggalan sebelum 31 Januari 1997. Untuk perbuatan atau peninggalan begitu yang dilakukan sebelum 31 Januari 1997, ujian seperti yang dinyatakan dalam *Arulpragasan*, iaitu bukti melampaui keraguan munasabah di penutup kes pihak pendakwa, masih terpakai kerana pindaan tidak ditulis dengan bahasa, sama ada secara nyata atau melalui implikasi perlu, yang akan menyebabkannya beroperasi secara kebelakangan (lihat ms 15C–D dan 16B–E).

(2) Dengan beranggapan pindaan kepada KAJ telah, secara nyata atau melalui implikasi yang perlu, dijadikan terpakai secara kebelakangan, ia akan melanggar perkara 7(1) Perlembagaan Persekutuan kerana sekiranya suatu tindakan atau peninggalan sebelum 31 Januari 1997 tidak boleh dibuktikan melalui keterangan pada bila-bila masa telah dilakukan melampaui keraguan munasabah di penutup kes pihak pendakwa, pelaku perbuatan atau peninggalan tidak akan dipanggil untuk pembelaannya dan dengan itu tidak lagi boleh dihukum. Tetapi sekiranya perbuatan atau tindakan berkenaan yang tidak boleh dihukum dalam cara yang dinyatakan di atas boleh dibuktikan menerusi kes prima facie di penutup kes pihak pendakwa (beban membukti yang lebih rendah), maka pembelaan pelaku tersebut akan dipanggil. Dia akan menanggung risiko gagal untuk menimbulkan keraguan munasabah ke atas kes pihak pendakwa, dan kegagalan sedemikian akan dihukum dalam cara sebagaimana yang diperuntukkan oleh undang-undang. Dengan itu perkara 7(1) Perlembagaan Persekutuan telah dilanggar, dengan jelas sekali dalam tujuannya jika pun tidak peruntukannya (lihat ms 16E–I).]

Notes

For cases on judicial precedent, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1479–1496.

For cases on close of prosecution's case, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2899–2915.

For cases on power and duty of an appellate court, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 120–166.

For cases on appeal against acquittal, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 109–119.

For cases on credibility of witnesses, see 5 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1673–1682.

Cases referred to

Arulpragasan a/l Sandaraju v PP [1997] 1 MLJ 1 (refd)
Cassell & Co v Broome [1972] AC 1027 (refd)
Chiu Nan Hong v PP [1965] MLJ 40 (refd)
Haw Tua Tau v PP [1981] 2 MLJ 49 (refd)
Khoo Hi Chiang v PP [1994]1 MLJ 265 (refd)
Loh Kooi Choon v Government of Malaysia [1977] 2 MLJ 187 (refd)
London Tramways v London County Council (1898) AC 375 (refd)
Morelle v Wakeling [1955] 2 QB 379 (refd)
Munusamy v PP [1987] 1 MLJ 492 (refd)
PP v Chin Yoke [1940] MLJ 47 (refd)
R v National Insurance Commissioner, ex p Hudson [1972] AC 944 (refd)
Tan Boon Kean v PP [1995] 3 MLJ 514 (refd)
Young v Bristol Aeroplane Co Ltd [1944] KB 718 (refd)

Legislation referred to

Civil Law Act 1956 s 3
Courts of Judicature Act 1964 s 66
Criminal Procedure Code (FMS Cap 6) ss 173(f), 180
Evidence Act 1950 s 146(c)
Federal Constitution art 7(1)
Prevention of Corruption Act 1961

Appeal from: Criminal Appeal No 52–61 of 1988 (High Court, Kuala Lumpur)

Gurbachan Singh (*Bachan Singh & Kartar*) for the applicant.
Mohd Yusof bin Hj Zainal Abidin (Deputy Public Prosecutor) for the respondent.

Cur Adv Vult

Peh Swee Chin FCJ (delivering the judgment of the court): This criminal reference brought under the old s 66 (since repealed) of the Courts of Judicature Act 1964 deals with an alleged offence of cheating against the applicant which was alleged to have taken place on 7 May 1983. The applicant was originally charged in the Sessions Court, Kuala Lumpur and was acquitted and discharged on 31 January 1985 at the close of the prosecution's case without his defence being called. The Public Prosecutor then appealed against the order of acquittal to the High Court which set aside the order of acquittal and ordered a retrial.

The retrial before a different sessions court judge took place and at the close of the case for the prosecution, the applicant was again acquitted and discharged for the second time without his defence being called. For the second time, the Public Prosecutor again appealed and again the appeal was allowed, the order of acquittal was again set aside, ordering further that the applicant be called for his defence.

This time, the applicant was dissatisfied with the decision of the High Court and he applied for leave to refer to the Supreme Court certain questions of law. The Supreme Court, on 4 February 1991, allowed the application in respect of the following questions:

QUESTION 1

In an appeal against acquittal at the close of the case of the prosecution, can an appellate judge refuse to apply with or without assigning any reason, the latest decision of the Supreme Court on a point of law and adopt an earlier decision of the Federal Court?

QUESTION 2

Whether the appellate court in hearing an appeal against an acquittal at the close of the prosecution's case was right in law in holding that the learned president of the sessions court was wrong in assessing and weighing the reliability, credibility and veracity of the prosecution witnesses when the Supreme Court held in *Munusamy v PP* [1987] 1 MLJ 492 that:

> 'In considering the question of law whether there is some evidence (not inherently incredible) to prove one or more of the essential ingredients of the offence, the judge or magistrate must by necessity evaluate and weigh all the evidence. If there is no evidence at all to prove one or more of the essential ingredients of the offence, the accused must be acquitted without calling for his defence. The requirement of s 180 or s 173(f) of the Criminal Procedure Code (FMS Cap 6) cannot be properly complied with unless the judge or magistrate considers and evaluates all the evidence adduced by the prosecution as tested in cross-examination'

which not only allows a court to do so but also imposes a duty to do so.

QUESTION 3

In an appeal against acquittal, where the trial judge found corroboration was required on an essential ingredient of the charge, can an appellate judge reverse the order of acquittal without dealing with the reason given by the trial judge on the need of such corroboration?

The ascertaining of answers to at least two of the above questions would at least require a discussion as to what should have been the burden of proof applicable at the end of the prosecution's case against the applicant at that time in the second trial before the sessions court. Should it be a proof beyond a reasonable doubt or a mere proof of a prima facie case? The impact of the recent amendment to the Criminal Procedure Code (FMS Cap 6) to restore the test of prima facie case at the close of the prosecution's case would also have to be discussed. We will revert to these later and more elaborately.

The sessions court at the second trial had acquitted and discharged the applicant at the close of the prosecution's case by employing the test of prima facie case as expressly adopted in *Munusamy v PP* [1987] 1 MLJ 492. The sessions court further cited for support the dictum of Gordon Smith Ag JA in *PP v Chin Yoke* [1940] MLJ 47 (at pp 48–49), which it said was cited and approved by the Supreme Court itself in *Munusamy*'s case. The said dictum is as follows:

> ... that the magistrate or judge must necessarily accept the whole of the evidence for the prosecution at its face value. There may be good grounds for rejecting some part, or all of it and, therefore, it is necessary to weigh up this evidence and on so doing one may be satisfied that, if unrebutted, it would warrant the accused's conviction. In such case, the accused is then called upon to answer the prima facie case which has thus been made out against him. If, however, on the other hand, after weighing up such evidence for the prosecution one is satisfied that it would be wholly unsafe to convict on the evidence standing alone, then no prima facie case has been made out and the accused should not be called on for his defence.

A very brief summary of the evidence would be necessary to show how the sessions court actually applied the dictum to the evidence.

The applicant, then an advocate and solicitor, asked for and received RM60,000 from the complainant, a goldsmith. The receipt of the money was proved positively and was not disputed either. The complainant,

before he paid the sum, had been robbed by some persons of some gold ornaments worth about RM200,000. He lodge a report to the police, and it transpired that the police had suspected him of making a false report for the purpose of making a false insurance claim. The complainant was for this reason detained by the police for four days and later released. The applicant was employed by some relative of the complainant to act for the complainant, to defend him apparently on an impending charge of making a false report.

It was the story of the complainant that the applicant told him in whispering terms to the effect that the OCPD of Ampang police and the DPP (Deputy Public Prosecutor) could be bribed so that no further action would be taken. The sum of money for this purpose was quickly negotiated and agreed by the applicant and the complainant at RM40,000 for the two persons, and another sum of RM20,000 for the applicant's professional fee. It was the allegation of the complainant that the applicant told him to the effect that the further action sought to be prevented was that the police itended to detain him at Pulau Jerejak or at the police station for making a false robbery report.

The police had, after the complainant's report of robbery, seized 86 cheques, gold ornaments worth about RM70,000 and other items including the complainant's firearms, etc. The applicant was apparently engaged to secure the release of these, to make an insurance claim and to defend the accused of the false robbery report. The complainant said, inter alia, that he had agreed to give half of the value of gold ornaments seized by the police to the applicant.

The robbery report turned out to be probably genuine, and the alleged robbers were subsequently arrested and charged in court.

For some six months after the robbery report, the complainant lodged again a second report to the police about the alleged offence of cheating by the applicant, such report having been lodged on the advice of another lawyer who was a former partner of the applicant and who was at the time practising separately. At the time, the former firm of partnership (since dissolved) but earlier comprising the applicant and that other lawyer was facing a claim for negligence attributed by some suing client to the said applicant.

After considering the evidence, the sessions court found it could not rely on the evidence of the complainant, his mother and brother, describing, inter alia, three of them as being 'in no better position than that of an accomplice whose testimony as a matter of prudence requires corroboration'. The sessions court found that there was no corroborative evidence for the demand of the money in question as alleged by the complainant and forming the substance of the cheating charge.

His futher finding was, after referring to various parts of the evidence, that there was every possibility that the payment of RM40,000 (out of the larger sum of RM60,000) was for payment of fee for the applicant as well and that the second police report about cheating by the applicant was 'itself suspect', ie possibly false.

Looking at the questions posed in pursuance of leave granted earlier, they relate to the alleged errors of the sessions court in assessing credibility and reliability of witnesses and also on corroboration in regard to the evidence on the essential ingredients of the charge in question. It behoves us to go into the evidence in this case because the nature of the question posed makes it necessary, in addition to the other exercisable discretion that as a matter of justice the highest court of the land could go into such evidence to prevent any miscarriage of justice. We have mentioned the salient points of the evidence earlier in order to understand the nature of the questions posed and such evidence comes in handy also for review on which we have decided and re-consideration to see if any miscarriage of justice had occurred in this case.

In order to find out if the sessions court had erred in assessing credibility, reliability and veracity of prosecution witnesses, it would be essential to conclude first one way or another whether such assessment had indeed taken place. By disbelieving the evidence of the complainant and his mother and brother, who alleged the sum RM40,000 was for the two officers, and in view of other circumstances mentioned by the sessions court including the fact that the report of cheating was only lodged six months after the robbery report by the complainant on the advice of the applicant's former partner who had reason to be unhappy with the applicant, it is an inevitable conclusion that the sessions court had embarked itself in assessing the reliability and credibility of witnesses. Was the sessions court wrong in doing so? To answer this question and indeed to answer another question referred to us, we would have to discuss a number of connected topics, in order to explain our answers to be given later.

To revert to the question whether the sessions court was wrong in assessing the reliability, etc of the prosecution witnesses, at the time of the hearing of the appeal by the learned judge in the High Court from the sessions court's order of acquittal, the test of prima facie case at the close of the prosecution's case was still the law vide *Munusamy*'s case based on Lord Diplock's judgment in *Haw Tua Tau v PP* [1981] 2 MLJ 49, and for that matter the dictum of *Chin Yoke*'s case, the learned judge was therefore right at the time of the hearing of the appeal. The meaning of the test of prima facie case at the end of the prosecution's case is best stated by Mohd Azmi FCJ in *Munusamy v PP* [1987] 1 MLJ 492 at p 497F–G in the following words:

> On the assumption that the prosecution evidence was accurate, could the accused be lawfully convicted?

It would not do any violence to the language to say that the word 'accurate' could mean or should mean 'true' in the above quotation. It would also not be off the mark to say the words 'prosecution evidence' in the same quotation refer to the evidence of 'primary facts' mentioned by Lord Diplock who held that the prosecution made out a case by adducing such evidence of such primary facts in *Haw Tua Tau* (at p 51). Such evidence of primary facts could logically refer to evidence or evidence sufficient

enough to prove each ingredient of an offence, such as death as one of the ingredients in a murder case. Once there is sufficiency of such evidence, so long as it is not inherently incredible such as the landing of a flying saucer from outer space on Dataran Merdeka in Kuala Lumpur, a prima facie case is made out. In concluding on the sufficiency of such evidence to satisfy the said ingredients, there will be sometimes a lot of rejection of irrelevant or inadmissible evidence. It is in this connection that the dictum in *Chin Yoke*'s case must be understood. It should be borne in mind that Gordon Smith Ag JA who did not make it very clear, was then dealing with a novel, and with hindsight, a difficult point as well, a point taken very much for granted by people for what they respectively meant. The dictum, especially that part of it about 'it would be wholly unsafe to convict on the evidence standing alone' is very consonant with the judgment of *Haw Tua Tau*, and the meaning of prima facie case set out above. Such being the case, the said dictum which forms part of an explanation of what appears to be a prima facie case, would not entitle one to assess the veracity or credibility of evidence of witnesses as the sessions court had done by purportedly relying on the said dictum at the close of the prosecution's case.

It is history now that *Munusamy*'s case was overruled by *Khoo Hi Chiang v PP* [1994]1 MLJ 265, which was in turn overruled by *Tan Boon Kean v PP* [1995] 3 MLJ 514 which was in turn overruled by the majority judgment in *Arulpragasan*. All the cases were either in the Federal Court or in the Federal Court's forerunner, ie the Supreme Court. The judgment in *Arulpragasan a/l Sandaraju v PP* [1997] 1 MLJ 1 had settled the question, ie that the burden of proof at the close of the prosecution's case was proof beyond a reasonable doubt. By saying so, we have assumed that a later decision prevails over an earlier decision in the Federal Court and the question of comparative weights of a seven-man panel in *Arulpragasan*, three-man panel in *Tan Boon Kean* and five-man panel in *Khoo Hi Chiang* looms large as well. We would have to explain also all such things, and we do as follows.

The doctrine of stare decisis or the rule of judicial precedent dictates that a court other than the highest court is obliged generally to follow the decisions of the courts at a higher or the same level in the court structure subject to certain exceptions affecting especially the Court of Appeal.

The said exceptions are as decided in *Young v Bristol Aeroplane Co Ltd* [1944] KB 718. The part of the decision in *Young v Bristol Aeroplane* in regard to the said exceptions to the rule of judicial precedent ought to be acepted by us as part of the common law applicable by virtue of Civil Law Act 1956 vide its s 3.

To recap, the relevant ratio decidenci in *Young v Bristol Aeroplane* is that there are three exceptions to the general rule that the Court of Appeal is bound by its own decisions or by decision of courts of co-ordinate jurisdiction such as the Court of Exchequer Chamber. The three exceptions are first, a decision of Court of Appeal given per incuriam need not be followed; secondly, when faced with a conflict of past decisions of Court of Appeal, or a court of co-ordinate jurisdiction, it may choose which to

follow irrespective of whether either of the conflicting decisions is an earlier case or a later one; thirdly it ought not to follow its own previous decision when it is expressly or by necessary implication, overruled by the House of Lords, or it cannot stand with a decision of the House of Lords. There are of course further possible exceptions in addition to the three exceptions in *Young v Bristol Aeroplane* when there may be cases the circumstances of which cry out for such new exceptions so long as they are not inconsistent with the three exceptions in *Young v Bristol Aeroplane*.

A few words need be said about a decision of Court of Appeal made per incuriam as mentioned above. The words 'per incuriam' are to be interpreted narrowly to mean as per Sir Raymond Evershed MR in *Morelle v Wakeling* [1955] 2 QB 379 at p 406 as a 'decision given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding in the court concerned so that in such cases, some part of the decision or some step in the reasoning on which it is based, is found on that account to be demonstrably wrong'. It should be borne in mind that the year of *Morelle*'s case is 1955 whereas our s 3 of the Civil Law Act was enacted in 1956. The ratio in *Morelle*'s case is also part of the common law applicable to us.

In our local context, the Federal Court is to be substituted for the House of Lords with regard to the matter under discussion.

In this connection, it is interesting to refer to *Cassell & Co v Broome* [1972] AC 1027 at p 1054. It was held that courts in the lower tiers below the Court of Appeal could not rely on the per incuriam rule applied by the Court of Appeal for itself, but could choose between two conflicting decisions. We may add that they may so choose, whatever the dates of the conflicting decisions, as such dates do not matter to the Court of Appeal itself.

The rule of judicial precedent in relation to the House of Lords was stated in *London Tramways v London County Council* (1898) AC 375 that it was bound by its own previous decision in the interests of finality and certainty of the law, but a previous decision could be questioned by the House when it conflicted with another decision of the House or when it was made per incuriam, and that the correction of error was normally dependent on the legislative process.

However, in 1966, Lord Gardiner LC made the following statement on behalf of himself and all the Lords of Appeal in Ordinary commonly known as the Practice Statement (Judicial Precedent) 1966 which is set out below:

> Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individual can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.
>
> Their Lordship nevertheless recognize that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose, therefore, to modify their

present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.

In this connection, they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the especially need for certainty as to the criminal law.

This announcement is not intended to affect the use of precedent elsewhere than in this House.

Experience in the United Kingdom has shown that the power 'to depart from a previous decision when it appears right to do so' has been used very sparingly.

In Malaysia, the Federal Court and its forerunner, ie the Supreme Court, after all appeals to the Privy Council were abolished, has never refused to depart from its own decision when it appeared right to do so: see the above-mentioned Federal Court's cases on the question of burden of proof at the close of the prosecution's case.

Though the Practice Statement (Judicial Precedent) 1966, of the House of Lords is not binding at all on us, it has indeed and in practice been followed, though such power to depart from its own previous decision has been exercised sparingly also. It is right that we in the Federal Court should have this power to do so but it is suggested that it should be used very sparingly on the important reason of the consequences of such overruling involved for it cannot be lost on the mind of anybody that a lot of people have regulated their affairs in reliance on a ratio decidendi before it is overruled. In certain circumstances, it would be far more prudent to call for legislative intervention. On the other hand, the power to do so depart is indicated (subject to a concurrent consideration of the question of the consequences), when a former decision which is sought to be overruled is wrong, uncertain, unjust or outmoded or obsolete in the modern conditions.

In this connection, the question of a 'full court' or a panel of Federal Court comprising more than three members as compared with the ordinarily constituted coram of three members of the same court, arises for consideration. In view of the reasons about departing from its previous decisions advanced above, the effect or weight of a decision of a 'full court' and that of an ordinary coram is the same by necessary implication. A full court or a panel larger than the ordinary coram is usually indicated such as when an unusually difficult or controversial question of law is involved, or a question arises as to whether a previous decision of the Federal Court ought to be overruled.

If the House of Lords, and by anology, the Federal Court, departs from its previous decision when it is right to do so in the circumstances set out above, then also by necessary implication, its decision represents the present state of the law. When two decisions of the Federal Court conflict on a point of law, the later decision therefore, for the same reasons, prevails over the earlier decision.

A We are now in a position to deal with Question 1 posed to us and as set out above and our answer is in the negative.

When leave was granted in February 1991 to refer Question 2 posed to us and as set out above, and for that matter, when the High Court heard the appeal in 1990 from the decision of the sessions court in question, the B legal position of the burden of proof at the close of the prosecution's case was still governed by the test of prima facie case as in *Munusamy*'s case, so in answering the question cast in the past tense to indicate 1990, it should be borne in mind that the position of law referred to was as in 1990.

The answer to Question 2 therefore is in the affirmative.

C In this connection, if Question 2 had not been framed in the past tense so as to require an answer applicable in 1990 about the burden of proof at the close of the prosecution's case, but if it were cast in the present tense instead, then it is piquant that the sessions court would have been right in so assessing the reliability, etc of prosecution witnesses at the close of the prosecution's case, because, at the time of our hearing this reference, D the burden of proof beyond a reasonable doubt at the close of the prosecution's case as enjoined by the ratio of the *Arulpragasan*'s case would be applicable subject to what we have to say about the latest amendment to the Criminal Procedure Code (FMS Cap 6).

Saying so above would give practically retrospective effect to the said E ratio of *Arulpragasan*'s case decided in 1997 to apply to the instant case, but there is nothing wrong in this. It has long been the view and legal theory that judges are explorers or expounders of the law which has always been there, waiting to be discovered and expounded. Such expounding may amount further to a limited form of judicial law making but that is an inevitable consequence of judicial process as we know it. Interestingly, it appears that in F the United States of America, the judges of the Supreme Court there have the power to limit also the effect of their overruling a previous decision of theirs only prospectively, so as not to affect the parties presently before them, with such overruling vide also the interesting comment of Lord Simon of Glaisdale in *R v National Insurance Commissioner ex p Hudson* [1972] AC 944 at p 1206 G on this power which we do not have here.

The true position of the legal burden of proof at the close of the prosecution's case with regard to the amendment to the Criminal Procedure Code in question would have to be dealt with as the said amendment had already come into effect before we heard this criminal reference. We H should deal with it presently.

With regard to the summary criminal trials before the subordinate courts, its s 173(f), was, with effect from 31 September 1997, inter alia, amended by the Criminal Procedure Code (Amendment) Act 1997 which for the test of prima facie case at the close of the prosecution's case reads as follows:

I

(1) When the case for the prosecution is concluded the Court shall consider whether the prosecution has made out a prima facie case against the accused.

(2) If the Court finds that the prosecution has not made out a prima facie case against the accused, the Court shall record an order of acquittal

Similar amendment was made at the same time by the same amendment Act to trial before the High Court in connection with adopting the similar test by, inter alia, amending its s 180. We shall refer to these particular amendments as 'the said amendment' collectively hereafter.

The said amendment would apply, in our view, only to an act or omission constituting a criminal offence committed on or after 31 January 1997, and not to any such act or omission before 31 January 1997. For such act or omission committed before 31 January 1997, the test laid down in *Arulpragasan*'s case, ie that of proof beyond a reasonable doubt at the close of the prosecution's case, would still apply. We have to and we would presently give our reasons for saying so.

Parliament has plenary power to make retrospective criminal and civil law vide *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187, but when it makes such retrospective criminal law, it must steer clear of art 7, or for the purpose of the instant case, art 7(1) of the Federal Constitution.

The said amendment is not couched in terms, either expressly or by necessary implication, which would make it retrospective in operation, therefore the infringement of the said art 7(1) does not appear to arise.

Assuming that the said amendment had been, expressly or by necessary implication, made to apply retrospectively, it would have run foul of art 7(1) of the Federal Constitution in the manner mentioned below. Article 7(1) reads as follows:

> No person shall be punished for an act or omission which was not punishable by law when it was done or made, and no person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed.

The said amendment if enacted to operate retrospectively would have so run foul because if an act or omission before 31 January 1997 cannot evidentially be proved at any time to have been committed beyond a reasonable doubt at the close of the prosecution's case, the perpetrator of the act or omission would not be called for his defence and therefore would not be punishable any more. But if the act or omission in question not punishable in the way stated above can be proved by way of a prima facie case at the close of the prosecution's case (a much lesser burden of proof), then the said perpetrator will have his defence called. He will then be in jeopardy of failing possibly to throw or cast a reasonable doubt on the prosecution's case, and such failure will be punished in a manner as provided by law. Article 7(1) of Federal Constitution would thereby have been infringed, though very clearly in spirit if not by letter.

The said amendment could be viewed from another angle which this court should not blinkered from seeing.

A We have mentioned elsewhere often that in connection with any legislation on substantive matters of laws that there is a rule of presumption that it is not retrospective in operation, in the absence of a contrary intention by express words or necessary implication. But on any legislation on evidence or on procedure, there is a twist of such rule of presumption, this time round, the presumption now is that such legislation is retrospective B in operation in the absence of a contrary intention thereto by express words or necessary implication, subject to one exception as follows.

The exception is that such presumptive retrospective operation would not apply when the effect of applying retrospectively such legislation on procedure or on evidence would be to deprive a person of a vested right in C civil cases or in criminal cases (as in this criminal reference before us) when it would offend against art 7(1) of the Federal Constitution. Viewed from the said angle therefore, art 7(1) would still have the effect of barring the retrospective criminal law on evidence or procedure to the extent in art 7(1) despite such a twist of the rule of presumption. Thus, it would be D of no avail for anyone to contend that the said amendment in question, being by its nature, procedural or evidential, would operate retrospectively even if it is not a cast in retrospective terms.

On Question 3 as set out above and referred to us, since the question was drafted in the present tense, our answer to it is a qualified 'yes', ie (to E quote the words of the question in our answering) that 'in an appeal when the trial judge found corroboration was required on an essential ingredient of the charge' the appellate court can 'reverse the order of acquittal without dealing with the reason given by the trial judge on the need of such corroboration' if there is undoubtedly sufficient evidence by itself or overwhelming evidence from elsewhere in the case to prove beyond a F reasonable doubt a case against the accused, thereby causing no miscarriage of justice to the accused, notwithstanding the failure to deal with the reasons given by the trial judge.

It would be necessary to explain the actual nature of that evidence before the sessions court that is said to require corroboration lest our G answer to Question 3 is misinterpreted.

There is the well known rule that a judge must warn himself of the danger of convicting an accused person on the evidence of an accomplice, unless such evidence is corroborated and in the absence of such warning, the appellate court will quash the conviction. Such mere act of warning H himself however will not be sufficient to prevent such quashing of such conviction when the judge, without the necessary corroborative evidence, nonetheless decides to so convict because he is convinced by the complainant's evidence despite such risk, unless he in such event says further that the case has been proved beyond a reasonable doubt. Normally I this could be sufficient: see *Chiu Nan Hong v PP* [1965] MLJ 40 at p 43. In the matter of warning of danger of convicting without corroboration, the fact that *Chiu*'s case was a rape case makes no difference.

The relevant evidence at the trial shows that the accused was charged with cheating the complainant by obtaining money from the latter as a result of the accused telling the complainant that such money was required by the DPP and the OCPD of Ampang to settle the matter of false robbery report made by the complainant, otherwise he would be sent to Pulau Jerejak or would be detained at the police station again. On a moment's reflection, the charge facing the accused was not that of bribing or attempting to bribe the said DPP or OCPD of Ampang, but cheating the complainant of his money by making a pretence of promise of such bribing. If the accused had been charged with such bribing of the DPP and OCPD, then indisputably the complainant would be an accomplice for such a charge for they both would have been particeps criminis in it. But on such a cheating charge, the complainant was not an accomplice. It is to be remembered that even under the Prevention of Corruption Act 1961 as revised in 1971 and since repealed very recently and replaced by a new Act, a person who was an accomplice only by reason of making a corrupt payment was not presumed to be unworthy of credit, thus modifying somewhat the said well-known general rule of warning of the danger above-mentioned for corruption offences under that Act.

Notwithstanding the fact that the complainant and for that matter, the other relatives involved, were not in fact accomplices, their evidence would have however to be treated with some caution; in other words, the evidence might not normally be given full credit but only some degree of it, ie less weight might be given because they were persons of bad character for going along with the idea of the said bribing. Section 146(c) of the Evidence Act 1950 has by necessary implication, or expressly, provided for such caution. It is set out below:

> 146 When a witness may be cross-examined he may, in addition to the question hereinbefore referred to, be asked any questions which tend —
>
> (a) ...
>
> (b) ...
>
> (c) to shake his credit by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him, or might expose or tend directly to expose him to a penalty or forfeiture.

Generally, by conventional wisdom, the bad moral character of a man may impair, more often than not, his regard for truth.

Viewed in the light of s 146, having regard to the burden of proof beyond a reasonable doubt at the close of the prosecution's case, such burden being applicable to this case; taking account of the sessions court having the opportunity of seeing and hearing the witnesses, we feel it unsafe to interfere with the order of acquittal of the sessions court which must be treated as having resulted from a benefit of doubt being given to the accused on account of unreliability of the evidence of the complainant and his relatives.

We therefore confirm the order of the acquittal of the sessions court made at the close of the prosecution's case; the test of prima facie case was

not applicable on the facts of the instant case for reasons already given. Consequently, we set aside the order of the High Court dated 26 July 1990 and restore the order of the sessions court dated 25 November 1988. The applicant is therefore acquitted and discharged of the offence as charged.

Applicant acquitted and discharged.

Reported by Jafisah Jaafar